EXHIBIT 5

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Briefs and Other Related Documents
Frost v. HarperS.D.Tex.,2001.
United States District Court,S.D. Texas,Corpus Christi Division.
Angie FROST, Plaintiff,
v.
John HARPER, Michael "Mike" Sides, Robert Joseph Kostelnk, and Citgo Refining and Chemical Company, L.P., Defendants.
No. CIV.A. C-01-069.

March 23, 2001.

Rene Rodriguez, Attorney at Law, Diana Marie Martinez, Law Offices of Rene Rodriguez, Corpus Christi, Regina Bacon Criswell, Attorney at Law, Helotes, for Angie Frost, plaintiff.
Ralph F Meyer, Royston Rayzor et al, Corpus Christi, Myra Kay Morris, Royston Rayzor Vickery & Williams, Stanley Weiner, Jones Day et al, Dallas, for John Harper, Michael" Mike" Sides, Robert Joseph Kostelnk, Citgo Refining & Chemicals Company L. P., defendants.

ORDER DENYING MOTION TO REMAND AND DISMISSING CERTAIN CLAIMS
JACK, District J.
*1 Pending before the Court is Plaintiff's Motion to Remand. For the reasons set forth below, the Court will deny the motion. Additionally, the Court will dismiss certain of Plaintiff's causes of action for failure to state a claim upon which relief may be granted.

I. JURISDICTION

*1 Pursuant to 28 U.S.C. § 1331, this Court has federal question jurisdiction over this action because Plaintiff's causes of action are preempted by § 301 of the Labor Management Relations Act, 29 U.S .C. § 1985(a).

II. FACTS

*1 This is an employment dispute. In her First Amended Petition, Plaintiff alleges that she was employed by CITGO Refining and Chemicals Company (the "Company") for approximately 17 years with no record of disciplinary action. In 1999, however, Plaintiff was suspended without pay pending an investigation by the Company to determine whether Plaintiff had abused two days of sick leave. On January 12, 2000, the Company terminated Plaintiff, asserting as grounds that she had not cooperated with the investigation. Plaintiff appealed the termination through a grievance process, and the matter eventually was submitted to arbitration pursuant to the Collective Bargaining Agreement (CBA) that the Company had executed. In November 2000, the arbitrator rendered his opinion upholding Plaintiff's termination.

*1 Plaintiff sues the Company, Michael Sides, John Harper, and Robert Joseph Kostelnik. All three individuals, agents of the company, appear to have been supervisors or managers. Plaintiff alleges that the arbitrator rendered his decision "in whole or in substantial part on the written statements and testimony of Defendants John Harper and Michael 'Mike' Sides." Plaintiff alleges that Mr. Sides and Mr. Harper "carried out a scheme to doctor testimony and suborn perjury."

*1 Plaintiff asserts the following causes of action: against all Defendants, civil conspiracy to terminate her because of her vocal advocacy against sexual harassment and her active union activity; against the three individuals, fraud, in that Messrs Sides and Harper lied "for the purpose of inducing Defendant CITGO to terminate Plaintiff;" against the three individuals, intentional infliction of emotional distress; against the Company, breach of the Collective Bargaining Agreement; against Messrs. Sides and Harper, malicious prosecution; against all Defendants, abuse of process; against the three individuals, tortious interference with a contractual relationship; and against all Defendants, violations of the Texas Labor Code, in that they discriminated against her based on her age, race, and sex. Plaintiff seeks actual and exemplary damages.

*1 The Defendants removed the action, arguing that Plaintiff's claims are preempted by federal law.

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Plaintiff has moved for remand.

III. DISCUSSION

Sua sponte motion for dismissal

***1** The Court may dismiss a claim on its own initiative for failure to state a claim where the inadequacy of the claim is apparent as a matter of law. *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir.1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1267 (1992); *Shawnee Int'l N.V. v. Hondo Drilling Co.*, 742 F.2d 234, 236 (5th Cir.1984). The Court finds that several of Plaintiff's claims are inadequate as a matter of law.

Civil Conspiracy

***2** There are two essential elements to establish an actionable civil claim for civil conspiracy under Texas law: (1) there must be an unlawful purpose or an unlawful means of carrying out a lawful purpose by two or more persons; and (2) there must be at least one unlawful and overt act. *McLean v. International Harvester Co.*, 817 F.2d 1214, 1220 (5th Cir.1987) (citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983)). To establish a civil conspiracy, a plaintiff must be able to show, *inter alia*, a meeting of the minds of two or more person on the object or course of action. *Id.* at 934.

***2** The unlawful acts asserted by Plaintiff are the material misrepresentations by Messrs. Sides and Harper to the arbitrator during her appeal of her termination; Plaintiff claims that these individuals, as well as Mr. Kostelnik and the Company, conspired to obtain her dismissal. However, the acts of a corporate agent are the acts of the corporation, and a corporation cannot conspire with itself. *Elliott v. Tilton*, 89 F.3d 260, 264-265 (5th Cir.1996) (*citing* *Fojtik v. First National Bank*, 752 S.W.2d 669, 673 (Tex.App.-Corpus Christi 1988, writ denied)). "As a matter of law, a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the complained of action." *Id.* (*citing* *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex.App.-Corpus Christi 1991, no writ)).

***2** The only people alleged by Plaintiff to have participated in the conspiracy were Messrs. Harper, Sides, and Kostelnik and the Company. Thus, all alleged co-conspirators either were the Company or were agents of the Company. Accordingly, Plaintiff has failed to state a claim of civil conspiracy, because there essentially is only one actor. *See Elliott v. Tilton, supra.*

Fraud

***2** In Texas, the "elements of actionable fraud are: (1) Misrepresentation of a material fact; (2) with intention to induce action or inaction; (3) *reliance by the plaintiff;* and (4) damage." *Hennigan v. Harris County*, 593 S.W.2d 380, 383 (Tex.Civ.App.-Waco 1979, no writ) (emphasis supplied). In essence, Plaintiff has alleged that Harper and Sides misrepresented material information to the arbitrator and that the misrepresentations led the arbitrator to uphold her termination. Plaintiff has not alleged and admittedly cannot allege that she relied on any misrepresentation by the Defendants. Accordingly, Plaintiff has failed to state a claim for fraud.

Malicious Prosecution

***2** There are six elements to establish the tort of malicious prosecution of a civil claim: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex.1996). Without even considering whether a claim for malicious prosecution lies for institution of termination proceedings under an employment contract, the proceeding did not terminate in Plaintiff's favor. Plaintiff alleges that this does not matter, because a finding in her favor would have been "an impossibility ... because of the false testimony and evidence presented..." but Plaintiff cites no authority that would allow a plaintiff to maintain a malicious prosecution claim on that ground. Because Plaintiff has not alleged, and admittedly cannot allege, that the proceeding terminated in her favor, her claim must fail as a matter of law.

Tortious Interference with Contractual Relationship

***3** A cause of action for tortious interference with a

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contract is established upon a showing that (1) a contract existed between the plaintiff and a third party that was the subject of interference; (2) the defendant's act of interference was willful and intentional; (3) the intentional act of the defendant was a proximate cause of damage to the plaintiff; and (4) actual damage and loss to the plaintiff resulted. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex.1991). Plaintiff's claim for tortious interference fails because she is alleging that Harper, Sides, and Kostelnik tortiously interfered with her contract with CITGO. The problem with this claim is that all three of these individuals were acting as agents for CITGO; in essence, she is claiming that CITGO tortiously interfered with its own contract.

***3** As a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts. *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex.1995). In *Holloway*, the Texas Supreme Court noted, "To establish a prima facie case under such circumstances, the alleged act of interference must be performed in furtherance of the defendant's personal interests so as to preserve the logically necessary rule that a party cannot tortiously interfere with its own contract. We hold that to meet this burden in a case of this nature, the plaintiff must show that the defendant acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests." *Id.*, 898 S.W.2d at 796.

***3** Plaintiff's complaint fails to allege that Harper, Sides, and Kostelnik acted in any capacity other than their capacity as agents of the Company. Plaintiff has not alleged that these individuals were motivated by any cognizable personal interest. Accordingly, the Court finds that Plaintiff has failed to state a claim for tortious interference with a contract.

Preempted Claims

***3** Under the Labor Management Relations Act ("LMRA"), "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement" the state-law claim is preempted. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881-84 (1988); *Allis-Chalmers corp. v. Lueck*, 471 U.S. at 208-10, 105 S.Ct. at 1909-11 (1985). *See also*, Avco Corp. v. Aero Lodge No. 735 Int'l Assoc. of Machinists and Aerospace Workers, 390 U.S. 557, 88 S.Ct. 1235 (1968). "The critical inquiry concerns the necessity of looking to the terms of a collectivebargaining agreement to resolve a state law claim. Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Baker v. Farmers Elec. Co-op, Inc.*, 34 F.3d 274, 280 (5th Cir.1994) (internal quotations omitted) (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391-392, 107 S.Ct. 2425, 2430 (1987)). If the alleged conduct arises out of activities discussed in the collective bargaining agreement, courts generally hold that the claim is preempted; if the agreement would not condone the activity, there is no preemption. *Id.* at 280-81. *See e.g.*, *Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083 (9th Cir.1991) (reversing finding of preemption of emotional distress claim); *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250 (5th Cir.1990) (upholding a finding of preemption of an emotional distress claim); *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir.1985) (affirming the preemption of state tort claim arising out of the suspension and drug testing of employees).

***4** If the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement (CBA), the application of state law is preempted. *Trevino v. Ramos*, 197 F.3d 777, 779 (5th Cir.1999). Even if a claim implicates a CBA, however, preemption is not required if it only tangentially involves provisions of the agreement. *Id.*, 197 F.3d at 780. "[T]he bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.* (*quoting* *Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S.Ct. 2068 (1994). Moreover, a plaintiff's state law claims will not be preempted even though "intertwined" with a CBA, so long as they are not "inextricably intertwined" with it. *Id.* (*quoting* *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1089 (5th Cir.1991).

***4** Case law demonstrates that whether a claim requires interpretation of a CBA requires the Court to

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look at each of the legal elements of the claim and determine whether that element can be addressed only by interpreting some provision of the CBA. *See, e.g., Reece v. Houston Lighting & Power Co.,* 79 F.3d 485, 487 (5th Cir.1996) (analyzing Texas Labor Code claims); *Trevino v. Ramos,* 197 F.3d at 779-780 (same).

***4** With these principles in mind, the Court will turn to each of Plaintiff's remaining claims.

Intentional Infliction of Emotional Distress

***4** To prevail in a suit for intentional infliction of emotional distress in Texas, a plaintiff must show: (1) intentional or reckless conduct; (2) that is extreme or outrageous; (3) that caused emotional distress; and (4) that was severe in nature. *Burden v. General Dynamics Corp.,* 60 F.3d 213, 218 (5th Cir.1995). The Fifth Circuit appears to have adopted a rule in which any emotional distress claim in the employment context is preempted if there is a CBA. *See Stafford v. True Temper Sports,* 123 F.3d 291, 296 (5th Cir.1997) (because allegedly outrageous actions were taken in context of employment dispute, they were preempted by LMRA); *see also Burgos v. Southwestern Bell Telephone Co.,* 20 F.3d 633 (5th Cir.1994). The court pointed out, "in situations such as this, it is appropriate for a court to look at the collective bargaining agreement to see if an employer's actions are reasonable." *Id.*

***4** In *Burgos, supra,* the Fifth Circuit cited with approval a Fourth Circuit case finding that an intentional infliction of emotional distress claim was preempted, where part of the outrageous conduct alleged was treatment of the plaintiff's personal property. *McCormick v. AT & T Technologies, Inc.,* 934 F.2d 531 (4th Cir.1991) (*en banc*), *cert. denied,* 502 U.S. 1048, 112 S.Ct. 912 (1992). The Fourth Circuit held that the circumstances that must be considered in examining management's conduct are not merely factual, but contractual, and the collective bargaining agreement is a crucial component of these circumstances. *Id.,* 934 F.2d at 535-536. The Fifth Circuit agreed with this holding. *Burgos,* 20 F.3d at 636.

***5** In the instant case, Plaintiff complains not merely that the individual defendants' false statements were extreme and outrageous, but that they were outrageous "because these Defendants knew that false and perjured statements would not only substantiate Plaintiff's termination but also prevent any reasonable expectation of reinstatement through the grievance process." Plaintiff's First Amended Petition at 5. To prove this allegation, Plaintiff will have to show that the Defendants' conduct caused her termination and prevented her reinstatement, which would require the Court to delve into the propriety of the termination under the CBA. The claim is preempted under the reasoning of the *Burgos* case, *supra.*

***5** The fact that the claim is asserted against individual defendants does not help Plaintiff. In *Baker v. Farmers Elec. Co-op., Inc.,* 34 F.3d 274, 283-284 (5th Cir.1994), the Fifth Circuit noted that, where a claim in inextricably intertwined with a collective bargaining agreement, the status of some of the defendants as individuals does not defeat preemption.

Breach of Contract

***5** Plaintiff's breach of contract claim is indisputably preempted. Plaintiff alleges that CITGO entered into a Collective Bargaining Agreement, but that CITGO breached that agreement by failing to provide her a fair and impartial arbitration agreement. This claim is directly related to the CBA and is, therefore, preempted.

Abuse of Process

***5** In order for a person to recover for abuse of process, he must plead and prove three essential elements: 1) that the defendant made an illegal, improper, or perverted use of the process, a use neither warranted nor authorized by the process; 2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process; and 3) that damage resulted to the plaintiff as a result of such irregular act. *Martin v. Trevino,* 578 S.W.2d 763, 769 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd, n.r.e.). "In a narrow sense process refers to individual writs issued by the court during or after litigation. Process has been broadly interpreted to encompass the entire range of procedures incident

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to litigation. Black's Law Dictionary, 1370 (4th Ed.1951). The gravamen of an action for abuse of process is the misuse of process, whether properly or improperly obtained, for any purpose other than that which it was designed to accomplish." *Id.* Plaintiff's claim for abuse of process stands on shaky ground, because she does not complain about "process" in either the narrow or broad sense described in *Martin v. Trevino.* She is complaining about a private proceeding instituted by her employer pursuant to a private contract. There was no litigation involved, and no court issued any writ.

***5** Even if abuse of arbitration proceedings could fall within the ambit of a claim for "abuse of process," however, this claim is preempted, because such claims "implicate both procedural and substantive aspects of the CBA grievance provisions, and thus also fall within Section 301 preemption under the LMRA." Johnson v. Health Management Systems of America, 96 F.Supp.2d 711 (E.D.Mich.2000) (finding claim of "abuse of process" preempted where the plaintiff complained about the manner in which the employer carried out the grievance procedure defined by a CBA).

Discrimination under Texas Labor Code

***6** In Reece v. Houston Lighting & Power Co., 79 F.3d 485, 487 (5th Cir.1996), the Fifth Circuit examined an employee's claim of discrimination under the Texas Labor Code. The Fifth Circuit noted, "Reece's discrimination claim turns on questions of promotion, seniority, and assignment to training programs, all of which are provided for in the CBA. HL & P will undoubtedly rely on the CBA as its legitimate, nondiscriminatory reason for Reece's treatment. When Reece then attempts to show that HL & P's stated reason is pretextual, the CBA would have to be interpreted because Reece would have to challenge HL & P's rights under the CBA. Thus, the interpretation of the CBA is made necessary by an employer defense." (Citations and internal quotation marks omitted). In the instant case, Plaintiff asserts that "adverse employment actions" (presumably, her termination) were taken against her because of her race, age, and sex. When she attempts to demonstrate this, CITGO will point to the CBA, which includes provisions regarding abuse of sick leave and reserving to the company the right to discipline employees, as part of its non-pretextual reason for dismissal. This will require the Court to look into the CBA to determine whether the claim of abuse of sick leave was pretextual. Plaintiff's discrimination claim, therefore, is preempted.

Removal of Preempted Claims

***6** Under the well-pleaded complaint rule, federal preemption is generally a defensive issue that does not authorize removal of a case to federal court. However, in Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists, 390 U.S. 557, 88 S.Ct. 1235, 1237, (1968), the Supreme Court held that because state actions for breach of collective bargaining agreements were preempted by section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, the federal court had removal jurisdiction. In Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841, 2853-54 (1983), the Court explained that because "the preemptive force of § 301 is so powerful as to displace entirely" state actions for breach of a collective bargaining agreement, any such action "is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." The Court further stated: "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." 103 S.Ct. at 2854. Even though Defendants have raised preemption as a defensive issue, the case is removable if any of Plaintiff's claims are preempted as a matter of law. *See* Willy v. Coastal Corp., 855 F.2d 1160, 1165 (5th Cir.1988). The fact that Plaintiff's remaining claims are preempted by § 301 of the LMRA provides the necessary federal question jurisdiction for removal of this case. Accordingly, Plaintiff's motion for remand must be denied.

IV. CONCLUSIONS

***7** Plaintiffs' claims for civil conspiracy, fraud, malicious prosecution, and tortious interference with a contractual relationship are DISMISSED, without

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prejudice, for failure to state a claim upon which relief may be granted. Plaintiffs' claims for intentional infliction of emotional distress, breach of contract, abuse of process, and discrimination under the Texas Labor Code are preempted by the Labor Management Relations Act, and the Court has jurisdiction over those claims. Plaintiffs' motion for remand is DENIED.

S.D.Tex.,2001.
Frost v. Harper
Not Reported in F.Supp.2d, 2001 WL 34063533 (S.D.Tex.), 171 L.R.R.M. (BNA) 2792

Briefs and Other Related Documents (Back to top)

• 2:01CV00069 (Docket) (Feb. 16, 2001)

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EXHIBIT 6

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

2006 MAY 24 P 3:52

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

STEVE WEINBERG, Plaintiff, v. JERALD SOWELL, Defendant.	Civil Action No. 1:06cv611 CMH/TCB

NOTICE OF REMOVAL

To: THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PLEASE TAKE NOTICE that Defendant Jerald Sowell pursuant to 28 U.S.C. §§ 1441 et seq., hereby removes this action from the Circuit Court for Fairfax County, Virginia (Civil Action No. 2006-5384) in which the action is now pending. In support of this removal, Sowell states:

1. This civil action is subject to this Court's original jurisdiction under 28 U.S.C. §1331 and may be removed to this Court by Defendant Sowell pursuant to 28 U.S.C. §1441(b). The action was filed on May 2, 2006, by Plaintiff Steve Weinberg, formerly a "contract advisor" who provided services to NFL professional football players, against Defendant Jerrald Sowell, a former client of Weinberg. The action seeks to vacate a February 1, 2006 arbitration award by Arbitrator Roger P. Kaplan rejecting as untimely a grievance claim by Weinberg to collect unpaid compensation allegedly owed by Sowell. Exhibit A to Petition to Vacate. Weinberg's

action involves the interpretation and application of the NFLPA Agent Regulations ("Regulations") which require final and binding arbitration of player-agent disputes. Petition ¶¶8, et seq. The Regulations were established by the National Football League Players Association ("NFLPA") as exclusive collective bargaining representative for NFL players through collective bargaining with the NFL clubs pursuant to Section 9(a) of the National Labor Relations Act, 29 U.S.C. §159(a). The Regulations themselves constitute an agreement subject to §301 of the Labor-Management Relations Act, 29 U.S.C. §185. Pursuant to the collective bargaining agreement and the Regulations, the Defendant and Plaintiff entered into a separate contract which, inter alia, required Weinberg to arbitrate all representation disputes with Defendant. Disputes involving interpretation and application of these various agreements are covered by §301 of the Labor Management Relations Act (29 U.S.C. §185), and are governed exclusively by federal law.

2. Under 28 U.S.C. §1441 et seq., the right exists to remove this action from the Circuit Court for Fairfax County, Virginia to the United States District Court for the Eastern District of Virginia, which embraces the place where the action is pending.

3. The Notice of Removal is filed within 30 days after receipt of the Petition by Defendant's agent on May 4, 2006.

4. Copies of the Petition, received by counsel for Defendant Sowell are at Tab 1.

5. A Notification of Removal is being filed in the Circuit Court for Fairfax County, Virginia concurrently with this Notice. A copy of the Notification of Removal is at Tab 2.

WHEREFORE, for the above-stated reasons, Defendant Sowell prays that Civil Action No. 2006-5384, now pending in the Circuit Court for Fairfax County, Virginia be removed to this Court.

Respectfully submitted,

[signature]

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May 24, 2006

CERTIFICATE OF SERVICE

Undersigned certifies that the foregoing Notice of Removal was served by facsimile and first-class mail, postage prepaid, this 24th day of May, 2006 on:

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Attorneys for the National Football League Players Association

Robert E. Paul

TAB 1

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

STEVE WEINBERG	)	
	)	
Plaintiff	)	
	)	Case No.
v.	)	
	)	
JERALD SOWELL	)	
	)	
Defendant	)	

PETITION
AND APPLICATION TO VACATE ARBITRATION AWARD

COMES NOW the plaintiff, Steve Weinberg, by counsel, pursuant to the Virginia Uniform Arbitration Act and the Federal Arbitration Act, and for his Petition and Application to Vacate Arbitration Award rendered in favor of the defendant, Jerald Sowell, respectfully states as follows:

1. Plaintiff, Steve Weinberg ("Weinberg") is a resident of Dallas, Texas. For over 20 years, Weinberg was previously certified as a National Football League Players Association ("NFLPA") Contract Advisor.

2. Defendant, Jerald Sowell ("Sowell") is a resident of the State of Louisiana and formerly employed as an NFL player with the New York Jets.

3. Weinberg and Sowell entered into a NFLPA Standard Representation Agreement ("Agreement") on December 31, 1996. The Agreement provided that Sowell would pay Weinberg fees equal to four percent (4%) of the compensation received by Sowell for each playing season for the negotiation by Weinberg of Sowell's NFL Player

Contract. In July, 1997, Weinberg negotiated a two-year NFL contract for Sowell with the Green Bay Packers.

4. Although the Green Bay Packers released Sowell in August 1997, his was two-year NFL contract was "claimed" by the New York Jets. As a result, Sowell played for the Jets during the 1997 and 1998 NFL seasons under the original two-year contract that Weinberg negotiated on his behalf with the Green Bay Packers.

5. Sowell received $131,000 from the Jets in 1997. Sowell also received a signing bonus of $22,000 in 1997 which had been negotiated by Weinberg. Weinberg sent Sowell an invoice for Contract Advisor fees for the 1997, and Sowell paid those fees for that year on December 18, 1997.

6. On June 27, 1998, Sowell sent Weinberg a letter terminating his services as his Contract Advisor. On July 2, 1998 Sowell and Weinberg spoke by telephone and Sowell told Weinberg that he was aware he would still have to pay Weinberg agent fees for the 1998 season, even though Sowell had terminated Weinberg. Sowell received $198,000 in salary from the Jets in 1998. Weinberg sent Sowell an invoice for the Contract Advisor fees on December 10, 1998. Despite his prior conversation with Weinberg, Sowell failed to pay the Contract Advisor fees due for the 1998 season.

7. Weinberg contact Sowell on several occasions over the period from 1999 to 2002 about the unpaid fees. In fact, following the receipt of Weinberg's invoice for the 1998 season, one of Sowell's new agents wrote a letter to Weinberg questioning certain expenses on the 1998 invoice, but at no time did the new agent or Sowell ever question the fees due for the 1998 season salary that appeared on this invoice, and that Sowell had told Weinberg he would pay at the end of the season. At no time did either Sowell or his

new agent ever inform Weinberg that Sowell was refusing to pay the 1998 Contract Advisor fees due for the 1998 season salary.

8. The Agreement provides that all disputes between the player and contract advisor shall be resolved exclusively through the arbitration procedures set forth in Section 5 of the NFLPA Regulations Governing Contract Advisors (the "NFLPA Regulations").

9. Section 5B of the NFLPA Regulations provides in pertinent part with respect to arbitration of disputes involving enforcement of fee agreements, that arbitration is initiated by filing a written grievance which must be filed within six (6) months from the date of the occurrence upon which the grievance is based or within six (6) months from the date on which the facts of the matter become known or reasonably should have become known to the grievant, whichever is later.

10. For many years the NFLPA has used Roger P. Kaplan ("Kaplan") to serve as the Arbitrator in arbitration cases filed under the NFLPA Regulations. During this time period, Kaplan has developed an extensive body of arbitration decisions that are made available to both players and contract advisors so that both parties can understand and enforce their rights under NFLPA Standard Representation agreements, which are ruled upon based on the procedures established by Section 5 of the NFLPA Regulations. Kaplan has decided over 100 cases in this forum. In addition to Kaplan, there have been at least three other NFLPA arbitrators used over the years, but Kaplan has been the main arbitrator for these cases since 1995.

11. The standard that was established for the "ticking of the six month rule" was actually established by Kaplan's predecessor, John Culver in a decision reached on

April 5, 1988. In Blatt and Bauer v. Gross, Case No. NFLPA 11059-016, (Culver, April 5, 1988), the Arbitrator found that the date on which the Contract Advisor made a request for a fee that he believed was owed and which the player left unanswered and unpaid was not the day on which the six (6) months began to run. Rather he held that, "the six-month period did not commence running until Sun West (the Contract Advisor) became aware that Mr. Gross was refusing to pay the fee, which is the 'occurrence or non-occurrence' upon which the grievance is bases." (Emphasis original). Thus it is the refusal to pay that is the triggering event for the running of the six (6) month period within which to file a grievance.

12. This standard was further explained in Segal & Levy and Lincoln, Case No. NFLPA 96-3 (Kaplan, January 14, 1997). In this case, the question was presented as to whether a player's failure to pay fees claimed by a Contract Advisor triggered the running of the six (6) month time period in Section 5.B. Kaplan stated, "In finding the Contract Advisor's claim to be timely filed, I held that the player's failure to pay did not constitute refusal because the player "failed to unequivocally inform his Advisors that they would not be paid for their alleged 1995 services."

13. Since 1995, Kaplan has consistently ruled in other arbitration cases that it is difficult to determine when non-payment of Contract Advisor fees becomes a refusal to pay, so as to trigger the six (6) month period for a Contract Advisor to file a grievance. Kaplan has repeatedly, and until now, consistently followed the legal standard announced in these prior cases, including Condon and Brown, Case No. NFLPA 96-9 (Kaplan, 1997), that:

"When a player has not unequivocally informed his advisor that advisor fees would not be made, the burden rests with the player to establish when the advisor "knew or should have known" that the player was refusing to pay his Advisor fee. In the instant case, Brown testified that he never informed Condon that he was refusing to pay his Advisor fees. Absent Brown's unequivocal notice of a refusal to pay, I cannot determine any date certain when Condon knew, or should have known that Brown was refusing to pay his Advisor fees."

14. Still having not received any refusal from Sowell to paying his 1998 advisor fees, Weinberg drafted a final invoice for Sowell dated July 1, 2002, and a grievance against Sowell dated July 7, 2002. NFLPA Regulations (Section 5.B) required that Weinberg "initiate his grievance against Sowell by (i) sending the written grievance by prepaid certified mail to the player, or by personal delivery, and (ii) sending a copy to the NFLPA." Weinberg did not know where to personally serve Sowell during the NFL off-season, so he waited to mail the grievance by prepaid certified mail once he knew for certain that Sowell had reported to the official start of the pre-season training camp with the New York Jets prior to the 2002 NFL season so that Sowell would actually receive the grievance as required by the NFLPA regulation. As a result, Weinberg mailed the grievance to Sowell via prepaid certified mail on August 1, 2002 during the first week of the NY Jets 2002 summer training camp. Weinberg also mailed a copy of the grievance to the NFLPA as required. Although the NFLPA Regulations required Sowell to file his answer by certified mail within 20 days of his receipt of the grievance (August 5, 2002), Sowell failed to file his answer to the grievance until September, 2005.

15. On September 19, 2002, Kaplan was appointed by the NFLPA as the Arbitrator in this case. On August 29, 2005, Kaplan notified the parties that he would conduct a telephone arbitration of this case on October 25, 2005. Weinberg participated in the telephone hearing from the office of his counsel in Fairfax County, Virginia, and accordingly, venue in this case is proper in the Circuit Court of Fairfax County.

16. On February 1, 2006, Kaplan issued an Opinion and Award (the "Award") that the grievance filed by Weinberg was untimely pursuant to Section 5 B of the NFLPA Regulations and denied the grievance. Counsel for Weinberg received a copy of the Award on February 2, 2006, a copy of which is attached hereto as Exhibit A. This petition and application to vacate award has been filed within 90 days after delivery of the Award to Weinberg.

17. In the Award, Kaplan recognized the well established NFLPA standard of law that when a player does not unequivocally inform his advisor that the advisor fees would not be paid, it cannot be determined when the advisor knew or should have known that the player is refusing to pay the fee. On page 7 of the Award, Kaplan specifically found that "Sowell never informed Weinberg that he was refusing to pay the 1998 Contract Advisor fees." Therefore, in accordance with every other case decided by Kaplan prior to this one, the burden of proof should have shifted to Sowell to prove that Weinberg "knew of should have known that he would not pay." Based on the prior case law established by this system, Kaplan should have ruled in favor of Weinberg since Sowell had not met his burden of proving that he had given Weinberg unequivocal prior notice of his refusal to pay. Furthermore, Sowell failed to establish the specific date that

Weinberg knew or should have known that Sowell had refused to pay the fee, and that Weinberg had failed to file his grievance within six (6) months of this date.

18. Had this case involved any contract advisor other than Weinberg, Kaplan would have ruled as he had done in every other contract advisor versus player fee case that he had previously heard, and found in favor of Weinberg. This is because in all the prior decisions, the sole determination by Kaplan for timeliness had been whether the player had "unequivocally refused to pay the fee", and when that burden had not been established, and the player had failed to present evidence that he had unequivocally told the contract advisor that he was refusing to pay, then the six (6) month clock for filing never began to run. In this case, Kaplan determined that at no time did Sowell ever inform Weinberg that he refused to pay the fee. Although Kaplan makes mention that under this theory, the clock would never begin ticking, and a contract advisor could wait some eight (8) years after sending invoices to a player and still file a timely grievance, Kaplan has previously and consistently awarded contract fees to numerous contract advisors who waited many years after the receipt of compensation by the player to file their grievance. In fact, in the case of Eastern Athletic Services v. Sauerburn, Kaplan awarded contract advisor fees, even though the agent waited until nearly five (5) years after the receipt of compensation by Sauerbrun. This case, however, involved Weinberg, and as alleged below, other person's with interests adverse to Weinberg, such that Kaplan has a such a strong personal bias against Weinberg that he would ignore the well established legal standard to rule against Weinberg. With manifest disregard of the law, Kaplan not only made a conscious decision to ignore the law and rule otherwise, Kaplan also created an entirely new standard contrary to the NFLPA Regulations, which could

then be applied retroactively to the approximately 70 other arbitration cases that Weinberg has filed previously, and are pending before Kaplan at this time.

19. Kaplan's strong bias against Weinberg has its genesis in a prior fee grievance case heard before Kaplan in November, 2000. In that grievance (Eastern Athletic Services and Todd Sauerbrun), Kaplan went out of his way to rule in favor of Eastern Athletic Services and against Weinberg's client (Todd Sauerbrun), who was formerly represented by an agent with Eastern Athletic Services. In that case, Kaplan found that the agent had committed numerous violations of the NFLPA Regulations. Despite these violations, including the fact that the agent could not even bring a grievance proceeding against Sauerbrun unless he had first properly complied with the NFLPA Regulations, which Kaplan found that he had not, Kaplan still ruled in favor of the agent on all counts.

20. As a result of the decision in the Sauerbrun case, Weinberg spoke out strongly against the fact that despite the fact the NFLPA arbitrator had found that an NFLPA Contract Advisor had violated the NFLPA Regulations, the contract advisor was still awarded fees under Section 5 of the Regulations, even though Section 4 specifically prohibited the filing of this particular grievance in the first place. Weinberg called for a changing of the NFLPA Regulations so that they would be consistent with the rulings of NFLPA Arbitrator Kaplan. In the alternative, Weinberg argued that when Kaplan found that a contract advisor had violated the Regulations, then the Regulations certainly required the NFLPA Agent Disciplinary Committee to investigate the circumstances and if the agent did violate the Regulations, then a discipline action should follow. When nothing was done, Weinberg spoke out about this situation in front of the entire agent

community at the annual NFLPA seminar in Indianapolis at the NFL Scouting Combine in February, 2002. Weinberg's comments were directed to NFLPA general counsel and also the NFLPA President and member of the NFLPA Agent Disoiplinary Committee. Rather than investigate the agent, the NFLPA general counsel ("NFLPA Counsel") instead decided to personally get back at Weinberg for his comments and for generally being a "thom in the side" of the NFLPA. Despite having knowledge of certain conduct by Weinberg in September, 2002, and filing a discipline complaint against Weinberg in November, 2002, NFLPA's counsel waited until a few weeks before Weinberg's clients were about to enter free agency to convince the Agent Disciplinary Committee (of which the NFLPA counsel is its chairman), to immediately revoke Weinberg's contract advisor certification even though no player had complained of Weinberg's conduct. Immediately upon receiving this revocation notice, Weinberg filed a timely appeal, which stayed the discipline so that he could continue to advise and represent his 17 NFL clients who needed him to negotiate their new NFL contracts. Because the NFLPA Regulations did not permit Weinberg to be immediately decertified, NFLPA Counsel argued at an Emergency Hearing before NFLPA Arbitrator Roger Kaplan that the Collective Bargaining Agreement gave the NFLPA the power to immediately decertify Weinberg, even if the NFLPA Regulations did not. Kaplan ruled that the Regulations allowed for the immediate decertification even though Kaplan was not empowered to "add to, subtract from, or alter in any way the provisions of the NFLPA Regulations, or any other applicable document" and Kaplan was empowered only to determine if the NFLPA Contract Advisor has violated the NFLPA Regulations, not the NFL Collective Bargaining Agreement.

21. During the emergency appeal by Weinberg to enforce the NFLPA Regulations as written, while the proceedings were off the record, NFLPA's Counsel stated in front of Kaplan that the sole reason for his revoking Weinberg's certification immediately was to prevent Weinberg from earning any new income, and that the alleged discipline issue related to the players was secondary. Notwithstanding this comment, and the fact that the NFLPA Regulations did not allow the NFLPA's Counsel to take the action he was taking against Weinberg, Kaplan ruled in favor of the NFLPA's Counsel, the person who hired Kaplan to act as Arbitrator in the NFLPA case. As a result, in February, 2003, Kaplan upheld the NFLPA's Counsel's argument that the NFL Collective Bargaining Agreement allowed him to decertify Weinberg immediately, and that Weinberg's timely appeal did not stay the discipline as stated by the NFLPA Regulations in effect at that time. On information and belief, Kaplan had deliberately delayed hearing another fee dispute involving Weinberg because if he done so, the NFLPA regulations would have precluded him from hearing the disciplinary grievance.

22. In addition to being hostile to Weinberg due to the animosity that NFLPA's Counsel and other NFLPA officials have against Weinberg, in this case Kaplan acted with partiality towards Sowell's player representative, ("Sowell's Representative"). On information and belief, Kaplan and the partner of Sowell's Representative have been close friends for approximately twenty (20) years. Kaplan has ruled in favor of that partner in other cases in ways that appeared to be contrary to clear NFLPA regulations. On information and belief, this same relationship has also lead Kaplan, in manifest disregard of well established legal standards consistently applied since 1997, to develop a new arbitrary and capricious standard in contravention of the NFLPA Regulations in

order to find in favor of Sowell, and set up a new, but retroactively applied rule, which he applied to deprive Weinberg of income due from his prior advisor contracts in furtherance of the NFLPA's Counsel's vendetta against Weinberg.

23. Even if Kaplan was not personally biased against Weinberg due to his relationship with others who hold interests against Weinberg, having previously heard and decided the emergency disciplinary hearing involving Weinberg, Kaplan could not be impartial towards Weinberg in this fee dispute. Kaplan's bias against Weinberg throughout the hearing in this case was apparent. For example, Kaplan upheld the objection of Sowell's Representative when Weinberg's counsel asked Sowell "Why didn't you pay the fees?" Thus, Kaplan excluded relevant evidence about why Sowell had not paid Weinberg in this case, even though in another case (where the partner of Sowell's Representative had filed a grievance and was attempting to collect fees four and a half years after the players receipt of compensation from the team), Kaplan used the specific reason why that player did not pay his fees to that agent as one of the reasons Kaplan sided with that agent in allowing the timeliness of the grievance in that case.

24. Kaplan's bias against Weinberg, whether stemming from his relationships with others and/or from Kaplan's prior decertification of Weinberg in February, 2003, became even more apparent during the hearing of this case. Despite numerous pages of uncontradicted testimony by Sowell that he never informed Weinberg of an intent not to pay or refusal to pay Weinberg, Kaplan found it "difficult to place much credence of this part of Weinberg's testimony" relating to Weinberg's version of the events. See Award at page 8.

25. In ruling against Weinberg in this case (and also setting the groundwork for ruling against Weinberg in the approximately 70 other pending NFLPA grievance cases to be heard by Kaplan), Kaplan first stated the existing law requiring the player to prove that he had informed the advisor of the refusal to pay the fee more than six (6) months before the grievance was filed, but then deliberately ignored that rule by creating an entirely new "two-year" rule which itself is contrary to the NFLPA Regulations. Under his new "two-year" rule, Kaplan states that

"the burden shall rest with the Contract Advisor to establish that the grievance is timely, when that Contract Advisor has been terminated by the player and has filed a grievance more than two (2) years after the receipt of compensation by the player. This burden rests with the Contact Advisor to show that he did not know or should not have reasonably known that the player was refusing to pay after the two (2) year period. Absent unusual and/or extenuating circumstance, a Contract Advisor's failure to file a grievance, within the parameters established above, shall be deemed an untimely filing under section 5B. of the NFLPA Regulations." Award at p. 10-11.

26. Kaplan's new rule that only a terminated contract advisor has to file his grievance within two (2) years from receipt of last compensation by the player, which creates a standard that will penalize Weinberg in the other 70 grievances which he has pending before the NFLPA, is contrary to Section 5B of the NFLPA Regulations (which states that "the Arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of these Regulations or any other applicable document"), and is therefore beyond the powers of Kaplan conferred upon him by the NFLPA Regulations.

Count I

Vacation of Award under Va. Code § 8.01-581.010.

27. Weinberg re-alleges and incorporates herein the allegations of paragraphs 1 through 26 as if fully set forth herein.

28. The award was procured by corruption, fraud, or other undue means.

29. There was evident partiality by the arbitrator and misconduct prejudicing the rights of Weinberg.

30. The arbitrator exceeded his powers.

Wherefore, Weinberg, by counsel, moves the Court to vacate the Award dated February 1, 2006 and declare it to be null, void and of no effect, and to order a rehearing before a new arbitrator to be chosen by the Court, and for such other relief as the Court may award.

Count II

Vacation of Award under 9 U.S.C. § 10

31. Weinberg re-alleges and incorporates herein the allegations of paragraphs 1 through 26 as if fully set forth herein.

32. The award was procured by undue means.

33. There was evident partiality or corruption by the arbitrator prejudicing the rights of Weinberg.

34. The arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy and other misbehavior by which Weinberg's rights have been prejudiced.

35. The arbitrator exceeded his powers.

36. The arbitrator acted with a manifest disregard of the applicable law.

Wherefore, Weinberg, by counsel, moves the Court to vacate the Award dated February 1, 2006 and declare it to be null, void and of no effect, and to order a rehearing before a new arbitrator to be chosen by the Court, and for such other relief as the Court may award.

STEVE WEINBERG
By Counsel

VANDERPOOL, FROSTICK & NISHANIAN, P.C.

By: ______________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2006 a true copy of the foregoing Petition And Application To Vacate Arbitration Award was sent via first class mail, postage prepaid as indicated to:

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Hunt Valley, Maryland 21031
Representative of Jerald Sowell

____
Randolph D. Frostick

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TOTAL P.15

TAB 2

VIRGINIA

FILED COURT SERVICES PM 1:10 JOHN T. FREY CLERK, CIRCUIT COURT FAIRFAX, VA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

STEVE WEINBERG Plaintiff, v. JERALD SOWELL Defendant	)	Civil Action No. 2006-5384

NOTIFICATION OF REMOVAL

PLEASE TAKE NOTICE THAT on this 24th day of May 2006, the attached Notice of Removal with a copy of the Civil Petition to Vacate in this action was duly filed with the Clerk of the United States District Court for the Eastern District of Virginia.

Respectfully submitted,

[signature]

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May 24, 2006

CERTIFICATE OF SERVICE

Undersigned certifies that the foregoing Notification of Removal was served by facsimile and first-class mail, postage prepaid, this 24th day of May, 2006 on:

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